United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-7179

To be argued by
ROBERT J. GIUFFRA
20 minutes

United States Court of Appeals
FOR THE SECOND CIRCUIT

CHARLES SCALAFANI,
Plaintiff-Appellee,

against

MOORE-MCCORMACK LINES, INC.,
Defendant and Third-Party Plaintiff-Appellant-Appellee,

against

UNIVERSAL TERMINAL & STEVEDORING CORP.,
Third-Party Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF DEFENDANT AND THIRD-PARTY PLAINTIFF-APPELLANT-APPELLEE

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Jurisdiction

This brief is submitted by defendant and third-party plaintiff, Moore-McCormack Lines, Inc. (hereinafter referred to as Mormac), in support of its appeal from the memorandum decision of Honorable Mark A. Costantino,

United States District Judge for the Eastern District of New York (199a)*.

The Court below, which only decided the question of liability, held Mormac liable on two grounds, namely, the unseaworthiness of the SS "MORMACDRACO" and negligence for the failure to provide a safe place to work. The Court, however, allowed recovery against the third-party defendant Universal Terminal & Operating Co. (hereinafter referred to as Universal), the stevedore contractor, on the basis that the third-party defendant breached its warranty of workmanlike performance.

The decision of the Court below was entered on February 10, 1975. Universal filed a Notice of Appeal on May 12, 1975 and Mormac filed its Notice of Appeal on the same date. The Record on Appeal was transmitted to the United States Court of Appeals for the Second Circuit on behalf of Mormac and Universal on or about April 17, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1292(a)3.

The decision of the Court below is reported at 388 F.Supp. 897 (E.D.N.Y., 1975).

Statement

This appeal arising out of a non-jury action brought in the United States District Court for the Eastern District of New York by Charles Scalafani, a longshoreman, to recover damages for personal injuries sustained on January 2, 1971, while he was in the process of boarding the SS "MORMADRACO" a vessel owned and operated by Mormac.

The action was filed on behalf of Charles Scalafani on May 5, 1972. An answer was filed by Mormac on July 5, 1972. At the time the answer was filed, Mormac served and filed a third-party complaint against Scalafani's employer, Universal.

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* References to pages in the Joint Appendix.

A non-jury trial was conducted by Judge Costantino for the Eastern District on May 5 and September 23 and 24, 1974. Judge Costantino only considered the issue of liability between the parties and no evidence of any damages was presented to Judge Costantino. No Pre-Trial Order was filed and the trial itself consisted of the testimony of Scalafani and his witnesses. In addition, the deposition of Gerald Gorden, the relief Mate in charge during the relevant period was marked into evidence, as well as various exhibits to include photographs of the vessel's gangway (18a-37a; 88a-104a).

Judge Costantino filed a memorandum decision on February 10, 1975 (199a). Notice of Appeal was filed on behalf of Universal and Mormac on May 12, 1975. The Notice of Appeal filed by Mormac was from that part of the decision which allowed recovery by Scalafani against Mormac. No appeal was filed by Mormac from that part of the memorandum which allowed recovery by Mormac against Universal for any damages which may be assessed in favor of Scalafani against the vessel owner.

The Record on Appeal was transmitted on behalf of both appellants in the United States Court of Appeals for the Second Circuit on April 22, 1975. The appeals have been consolidated by the Clerk of the United States Court of Appeals.

In this presentation, Mormac contends that Scalafani did not establish a *prima facie* case of liability on either theory of negligence or unseaworthiness. If this Court rules otherwise, Mormac, as appellee, maintains that the trial Court was correct in holding Universal responsible for any damages which may be recovered by Scalafani from the vessel because Universal breached its warranty of workmanlike performance.

Issues Presented for Review

1. Whether Scalafani established his burden of proof that Mormac was negligent?

2. Whether the trial Court was correct in finding that the SS "MORMACDRACO" was unseaworthy?

3. Whether the trial Court was correct in finding that Scalafani was not contributorily negligent?

4. Whether the trial Court was correct in its determination that Universal breached its warranty of workmanlike performance owed to Mormac?

Summary of Argument

Mormac, as appellant, maintains that the trial Court's Findings of Fact and Conclusions of Law that it was negligent and that the SS "MORMACDRACO" was unseaworthy are clearly erroneous on the evidence adduced at trial.

Mormac contends that it acted prudently and in a reasonable manner in undertaking to remove from the vessel's gangway a heavy snowfall. Additionally, the lack of any evidence that the cleaning was done improperly, and that, there was a duty to warn of an obvious danger, Scalafani was not entitled to recover on either the negligence or unseaworthy cause of action.

Moreover, Mormac asserts that the specific finding by the trial Court that Scalafani was free from contributory negligence is clearly erroneous based on the proof which demonstrated that the injury was caused exclusively by Scalafani's own negligence, which would in itself preclude any recovery based on either negligence or unseaworthiness.

As appellee, Mormac takes the position that if this Court agrees with the determination by the trial Court concerning its liability to Scalafani, it is submitted that the proof was consistent with the finding that Universal breached the warranty of workmanlike performance owed to Mormac which would entitle Mormac to recover full indemnity for any damages which may be assessed.

Statement of Facts

In this action, Scalafani, a longshoreman, seeks to recover damages for personal injuries sustained on January 2, 1971 at about 2:00 P.M. The vessel owned and operated by Mormac at the time was at Mormac's 23rd Street Terminal in Brooklyn, New York.

Scalafani in boarding the vessel was required to use the vessel's gangway which was located at the midship-house on the starboard side. The gangway consisted of a number of steel steps, at the top of which, there was a platform approximately three feet by four feet which led onto the vessel's deck. The gangway was equipped with chains or hand railings which extended to the end of the gangway and on the platform a distance of approximately 1 to 1½ feet. Stanchions supporting the chains were located at the end of the platform. The vessel's bulwark or railing was on both sides of the platform portion of the gangway.

The characteristics of the gangway are noted in the photographs marked into evidence during trial (Original Record on Appeal, Document No. 15, Mormac's Exhs. A-F; 49a; 50a; 57a-58a).

Scalafani testified that all of the steps and the platform of the gangway were covered with small patches of snow and ice covered with sawdust. Scalafani readily conceded that he was aware of these conditions prior to his accident (48a; 61a; 128a).

This admission or acknowledgment by Scalafani becomes significant as he testified that he was not holding onto neither the chains, stanchions or the ship's railings prior to his fall (60a; 127a; 142a). Although, he indicated that he had always held on to the ship's railings on prior occasions (142a). Both of Scalafani's witnesses Misseri and Bianchi acknowledged that chains and stanchions were in place at the time (159a; 181a).

The physical layout of the vessel's gangway becomes important to the factual issues concerning the location of the accident, the contributing cause thereof and whether Scalafani was contributorily negligent.

Scalafani's testimony as to the causation was to the effect that he was not certain of the cause of the fall. Moreover, he testified that he observed nothing in the area which could have contributed to his slipping (51a; 68a). It was only sometime after the incident while Scalafani was being assisted by his fellow longshoremen and witness Misseri, did he attribute the fall to the presence of a combination of ice, snow and sawdust on the platform of the gangway.

These conditions had been observed by the plaintiff prior to his slipping. This was unquestioned and admitted by Scalafani (62a; 127a; 128a). The same conclusion concerning the uncertainty as to the element causing the fall was made by Misseri (150a).

In an apparent attempt to relate the slipping to the presence of ice and snow on the platform of the gangway, Scalafani and his witnesses testified that they observed one skid mark on the platform (71a; 150a; 157a; 180a; 186a).

However, Scalafani and his witnesses disagreed as to the location of the skid mark. Scalafani on one hand testified that the skid mark was on the forward end or front of the platform, so that, his next step would have been

onto the deck of the vessel (71a). This was apparent, as Scalafani indicated that he observed that the deck of the SS "MORMACDRACO" was wet. This confirmed a lack of conflict by Scalafani as to his knowledge of his location on the gangway before he fell (71a; 131a).

On the other hand, both Misseri and Bianchi testified that they observed the skid mark on the circular portion of the gangway, approximately three to four feet from the end or front of the platform and in their words, "in the center of the platform" (157a; 160a).

The witnesses' observation of the skid mark was pointed out by their marking the location on photographs which had been admitted into evidence. (Original Record on Appeal, Document No. 15, Mormac's Exhs. A-F).

Besides the conflict between Scalafani and his witnesses concerning the location of the skid mark, there was another dispute of whether in fact there was any ice and snow at the end of the platform. Misseri and Bianchi both testified that these conditions did not exist on that portion of the platform which was not exposed to the elements or in other words the end of the platform (155a-156a; 184a).

The disagreement on these issues raises the question of whether ice and snow played any part in the accident or whether it in fact occurred when Scalafani turned his right ankle while stepping off the gangway on to the deck as reported by Scalafani immediately after the occurrence to his employer (Original Record on Appeal, Document 15, Mormac's Exh. G).

No proof was submitted that any report was made to the vessel's officers or Universal's superintendent, Patrick O'Connor, that the gangway was dangerous in any manner although three longshore gangs on at least three occasions prior to the accident had used the gangway to board the vessel.

Mormac in connection with the defense introduced evidence from Gerald Gorden, the vessel's mate on duty on both January 1, 1971 and January 2, 1971.

Gorden confirmed that there was a heavy snowfall on January 1, 1971 but that a shore gang had boarded the SS "MORMACDRACO" to remove the heavy accumulation from the vessel's gangway and decks (94a).

Upon completion of the snow removal, Gorden inspected the gangway and it was his opinion that it was cleared of ice and snow and not unsafe. This conclusion was reconfirmed by Gorden when he conducted an inspection of the gangway when he reboarded the vessel on January 2, 1971, at 0800 hours and during the periodical inspections before the plaintiff's accident (97a; 100a-101a). Gorden further agreed with the log entry made by the other relief officers, that the gangway was safe (102a).

Stipulation by all counsel concerning the testimony of Mr. O'Connor supported the Mate's testimony (109a).

A possible explanation of how patches of ice and snow accumulated on the gangway was provided by Scalafani who traced this condition to other longshoremen tracking the snow on board during the course of the day (48a). The ice and snow of the gangway was observed by Universal's superintendent prior to the accident (109a).

POINT I

The trial Court erroneously concluded that the shipowner was negligent; the vessel unseaworthy and that Scalafani was not contributorily negligent in any manner.

A. Nature of the Proof Submitted to Demonstrate Negligence of the Shipowner.

Trial Court made separate finding of facts as to the negligence of Mormac and the unseaworthiness of the vessel. Specifically, the Court found that the platform where Scalafani slipped was in an unsafe condition because of patches of ice, snow and sawdust and the absence of hand rails or other supporting devices. Moreover, the Court concluded that Mormac through the mate on duty, had either actual or constructive notice of the unsafe condition (199a).

Mormac contends that these conclusions were clearly erroneous and urges a trial *de novo* in this Court on the evidence considered by the trial Court. *McAllister* v. *United States,* 348 U.S. 19.

The finding concerning the handrails was not properly within the pleadings in view of the answers to interrogatories filed on behalf of Scalafani wherein he did not attribute his accident to the missing handrails (34a-35a).

The plaintiff in order to recover for negligence has the burden of proof of going forth with evidence to establish the essential elements of the cause of action. The essential elements based on the context of this litigation required proof that a dangerous condition existed on the platform of the gangway, which the shipowner through its employees had either constructive or actual notice. In addition, evidence of the size or location of the patches of ice and snow, and the length of time it had been there in order to afford a reasonable notice of their existence to the ship-

owner, who in turn would be required to correct the condition for the protection of Scalafani and those similarly situated. Cf. *Ianuzzi* v. *South African Marine Corp., Ltd.*, 510 F.2nd 950 (2nd Cir. 1975).

Moreover, in view of the finding that a heavy snowfall had been removed on January 1, 1975, Scalafani was required to demonstrate that the shipowner failed to exercise reasonable care in the snow removal or that it was done improperly.

The final element of proof was whether the shipowner owed a duty to warn of an obvious danger in walking across the platform of the gangway. In the absence of any evidence on all of these essential elements of the burden of proof, Scalafani could not recover on this cause of action as there would be no foundation for the shipowner's liability. *Berke* v. *Lehigh Disposal Corp.*, 435 F. 2nd 1033 (2nd Cir. 1970); *Blier* v. *United States Lines, Co.*, 286 F. 2nd 920, 925 (2nd Cir. 1961); *Traupman* v. *American Dredging Co.*, 470 F. 2nd 736 (2nd Cir. 1972); *Rice* v. *Atlantic Gulf & Pacific Co.*, 484 F. 2nd 1318 (2nd Cir. 1973); *Gilmore & Black*, The Law of Admiralty 2nd Edition § 6-34 at page 374.

The mere happening of the accident did not shift to the shipowner the burden of establishing that the accident did not occur through its negligence nor does it create a presumption of negligence. On the contrary, this Court has decided that there is in fact a presumption that reasonable care was exercised by the shipowner. *Armstrong* v. *Commerce Tankers Corp.*, 423 F. 2nd 957 (2nd Cir. 1970), cert. denied, 400 U.S. 833.

It is submitted that at most Scalafani's testimony showed that there were small patches of ice and snow combined with sawdust on the steps and platform of the gangway. However, there was no testimony showing that these conditions in fact existed at the end of the platform or the area wherein Scalafani claims he allegedly slipped.

Additionally, the proof submitted did not in any way establish that a dangerous condition was on the platform of the gangway nor did it substantiate any claim that Mormac acted unreasonably when it arranged for the removal of the heavy snowfall of 6.4 inches from the vessel's decks and gangway on the day before the accident.

The testimony of Scalafani and his fellow longshoremen witnesses, raised considerable doubt whether the ice and snow was in any manner causally connected with the injury. As previously pointed out, Scalafani himself acknowledged that he was not aware of the contributing factor to his falling (51a; 61a).

The only evidence introduced showing the causal connection between the alleged dangerous conditions on the platform was the testimony that one skid mark was observed on the platfrom after the accident. However, in this regard, there was considerable dispute between Scalafani and his eye witnesses as to its location on the platform. Scalafani testified that the skid mark was at the front or forward end of the platform while his witnesses placed the skid mark on the circular portion of the platform (71a; 131a; 157a; 160a). The circular portion of the platform being about three to four feet from the end of the platform.

The finding by the trial Court that the absence of the support devices was another element showing the shipowner's negligence was also clearly erroneous. The evidence, in fact, confirmed that the handrailings extended about 1 to 1½ feet onto the platform at the end of which stanchions were in place in order to support anyone walking across the platform. The vessel's railing was in place and common sense would dictate that it should have been utilized by Scalafani to support himself, if necessary, in walking across the platform.

The trial Court did not even consider the question of whether a duty was owed to Scalafani. It is submitted that under the decisions, the trial Court was required to

find that there was such a duty and that there was a failure on the part of the shipowner to warn Scalafani of the dangerous condition. The absence of such a finding made the trial Court's determination erroneous as a matter of law. Restatement (Second) of Torts § 343, 343a 1966; *Hite* v. *Maritime Overseas Corp.*, 380 F.Supp. 222 (D.C. E.D. Texas 1974).

This essential finding was necessary before a *prima facie* case of liability for negligence could be made. *Bess* v. *Agromar Line,* 518 F2nd 738 (2nd Cir. 1975).

It is submitted that neither Scalafani nor his witnesses were cognizant of any defective or dangerous condition on the platform and, it must be presumed, that the dangerous condition was not even known to the shipowner who through the vessel's mates did conduct periodical inspections.

Another deficiency in the Court's findings concerns the question of proximate cause because of the conflict between Scalafani and his witnesses as to the location of the alleged dangerous condition and the fall. The fact of the matter remains that Scalafani must have fallen, but the most logical explanation as to the contributing cause was contained in the statement made by Scalafani to Universal's timekeeper immediately after the occurrence, i.e., that he turned on his ankle while stepping off the gangway. At the time the report was made, there was no indication by Scalafani that ice or snow contributed in any manner to the slipping (Original Record on Appeal, Document No. 15, Mormac's Exh. G).

We also would like to refer this Court to New York State Court decisions concerning the liability for negligence involving accidents because of the presence of ice and snow on the ground. All the New York decisions have held that if the evidence demonstrates that a defendant failed to remove all of the ice or snow there would be no liability. The Courts have only permitted recovery in those cases

where the proof supports a finding that a defendant by an affirmative act permits ridges of ice and snow to remain on the ground which conditions would occur after efforts were made to remove the snow.

In substance, the New York Courts as a pre-requisite of finding liability have determined that a defendant by his own actions increased the hazards to be expected because of the fallen snow. In the absence of this proof, the New York State Courts have consistently held the defendant not liable even though the proximate cause of the accident was the ice or snow. *Kelly* v. *Rose,* 265 App. Div. 928, aff'd 291 N.Y. 611; *Glassman* v. *City of New York,* 284 App. Div. 1045, aff'd 1 N.Y. 2nd 712; *Mills* v. *Farwin Realty Corp.,* 30 A.D.2nd 537.

In view of all of these factors, it is submitted that a mistake was made by the trial Court in its findings of fact and conclusion of law concerning Mormac's liability because all of the necessary elements of a *prima facie* negligence case were not shown.

B. The Nature of the Proof Submitted to Demonstrate the Unseaworthiness of the SS "Mormacdraco".

Based on the same evidence concerning the cause of action for negligence, the trial Court concluded that the vessel was unseaworthy. This finding was dependant upon the same proof that Scalafani fell because of the existence of slippery patches of ice and snow and the absence of any support aids (202a).

This finding is inconsistent with the facts previously outlined as well as the recent decisions by this Court in *Rice* v. *Atlantic Gulf & Pacific Co.,* 484 F.2nd 1318 (2nd Cir. 1973).

In *Rice, supra,* this Court determined that grease on a deck of a vessel does not, standing alone, create an unseaworthy condition. It was held that a seaman and con-

versely, longshoremen, are not entitled to a deck, gangway or ladder which would be absolutely free of *all* oil, grease and by analogy, to the claims of this litigation, free of *all* ice and snow because even on a seaworthy vessel a slippery condition may exist.

Unseaworthiness would exist only if the condition of the slipperiness made the platform of the gangway unreasonably fit for its intended purpose as the vessel owner was not the insurer of the safety of Scalafani nor required to furnish a perfect ship. *Borgerson* v. *Skibs,* 156 F.Supp. 282 (E.D.N.Y. 1957); *Colon* v. *Trinidad Corp.,* 181 F.Supp. 282 (S.D.N.Y. 1960); *Mitchell* v. *Trawler Racer Inc.,* 262 U.S. 539 (1960).

Aside from the evidence concerning the presence of support aids to include the ship's railings and the strong inference that there was no ice or snow at the end of the platform, there was additional evidence that at least three gangs of longshoremen had used the gangway on at least three occasions prior to Scalafani's accident, and that no other claim or complaint was made that the gangway was unsafe. The use of the gangway by the other gangs creates the strong inference that the platform of the gangway was not unsafe nor that it was excessively slippery.

In answers to interrogatories propounded by Mormac, specifically questions 12, 13 and 15, no reference to the missing hand rails as a basis for any claim for unseaworthiness was made, and under the circumstances, the trial Court finding that this creates an unseaworthy condition was not warranted nor was it properly within the pleadings (34a, 35a).

Even if this Court agrees with the trial Court finding that an unseaworthy condition existed on the top of the platform, there was still insufficient evidence showing that the unseaworthy condition caused the plaintiff's fall in

view of the dispute concerning the location of the ice and snow on the platform of the gangway.

In a non-jury case, a finding of unseaworthiness by a trial Court requires a consideration of all relevant facts to include circumstances of the fall, the underlying contentions concerning fitness or nonfitness for use and whether the injured party by experience would or should be in a position to avoid a danger, especially, an obvious and open condition.

In this litigation we were not dealing with a situation where the shipowner was oblivious to the fact that snow had fallen and failed to act but rather, a situation where the shipowner affirmatively carried out its responsibility of cleaning the snow. By experience and common knowledge, in the removal of snow, there always remains a slight residue upon completion of the work and as seaworthiness contemplates reasonable fitness and not perfection, it is submitted that the SS "MORMACDRACO" was not unseaworthy at the time and place in question. We are not dealing with a situation where no efforts were made to remove snow. Cf. *Vareltzis* v. *Luckenback SS Co.*, 258 F.2d 78 (2nd Cir. 1958).

C. Nature of Testimony Concerning Scalafani's Negligence.

The trial Court specifically found that Scalafani was not contributorily negligent to any degree (201a).

By definition and usage, contributory negligence is the failure on the part of the injured person to exercise reasonable care for his own safety which cooperated in some degree with the fault of another in helping to bring about the injury. Applying this test, as well as, a common sense approach, it is submitted that the trial Court's finding that Scalafani was not negligent was clearly erroneous. The statement by Scalafani that he was carefuliy walking across the platform while acknowledging his awareness of

the condition of the platform, and at the same time, not holding onto the handrails, is and by itself, clear evidence of some contributory negligence.

Scalafani had the duty to act with ordinary and reasonable care for himself and at the same time had the duty to take precautions to avoid unnecessary dangers. At the very minimum, Scalafani in the exercise of ordinary care should have attempted either to avoid the patches of ice and snow; held onto the vessel's handrailings which extended 1 to 1½ feet onto the platform; supported himself by grasping the stanchions which were in position at the front end of the platform; or securing himself by gripping the vessel's bulwalk or railings which was on both sides of the platform.

The failure by Scalafani to take either of these reasonable precautions in and of itself supports the conclusion that Scalafani was negligent and the sole cause of his own injury.

It is obvious that Scalafani could have done something taking into account the surrounding supports which were available. The evidence rather than supporting a finding that the plaintiff was not contributory negligent, supports the conclusion that Scalafani's own negligence was the sole cause of the accident which would preclude any claim against the vessel owner. *Donovan* v. *Esso Shipping Co.*, 259 F.2d 65 (3rd Cir. 1958); *Pisano* v. *SS Benny Skou*, 346 F.2d 993 (2nd Cir. 1965).

Certainly, if the decisions precluding a plaintiff from recovering for injuries caused exclusively by one's own negligence have any significance whatsoever, it is within the framework of the facts in this case and they should be applied. Scalafani's own and exclusive negligence in the manner in which he traversed the platform without attempting to support himself in any manner was clearly the underlying and sole cause of his accident precluding any recovery against the vessel owner.

POINT II

The trial Court correctly held that the stevedore's contractor breached its warranty of workmanlike performance.

As appellee, Mormac asserts that the trial Court was correct in holding that Universal breached its warranty of workmanlike performance owed to Mormac (206a).

Stevedores normally object to any claim for indemnification on the basis that the shipowner by its action or inaction prevented or handicapped the stevedore in performing its workmanlike job. In this case, however, Universal because of lack of any proof that the shipowner was culpable in any manner in the performance of Universal's workmanlike obligation takes the position, that indemnity should be precluded, because the stevedores did not participate in nor observed the conduct of the clean up operation nor did they have any responsibility to remove the ice and snow from the gangway.

The fact remains that the trial Court concluded that a dangerous condition did exist on the vessel's gangway and further decided that the stevedore was in the superior position to prevent Scalafani's injury.

Once the determination was made by the trial Court that a dangerous condition existed on the platform of the gangway the next question which did arise was whether a workmanlike performance by Universal would have eliminated a risk of injury.

The trial Court having decided this question in the affirmative, Mormac was then entitled to be indemnified. This Court has previously decided that even though a hazard is created by the negligence of a shipowner or in the context of this case if this Court finds that the snow clean up was done improperly, the stevedore contractor would

still be liable if a workmanlike performance would have eliminated the risk of injury to its employees. *Nicroli* v. *Don Norske Afrika-og Australielinie Wilhelmseng Dampskibs-Aktieselskab,* 332 F.2d 651 (2nd Cir. 1964); *DeGioia* v. *United States Lines Co.,* 304 F.2d 421 (2nd Cir. 1962); *Henry* v. *A/S Ocean,* 512 F.2d 401 (2nd Cir. 1975).

In *DeGioia, supra,* this Court stated as follows at page 426:

> The function of the doctrine of unseaworthiness and the corollary doctrine of indemnification is allocation of the losses caused by shipboard injuries to the enterprise, and within the several segments of the enterprise, to the institution or institutions most able to minimize the particular risk involved.

This test was approved and applied by the Supreme Court in *Italia Societa* v. *Oregon Stevedoring Co., Inc.,* 376 U.S. 315, 324-325 (1964).

The warranty of a workmanlike performance requires the stevedores to remedy a dangerous condition on the vessel and to see that the longshoremen work in reasonably safe conditions. The fact that Universal's supervisor Mr. O'Connor was of the opinion that the condition on the top of the gangway was not dangerous was not revelant, in view of the trial Court's ultimate finding that an unsafe condition did in fact exist. *Bertino* v. *Polish Ocean Line,* 402 F.2d 863 (2nd Cir. 1968).

If Universal's contentions were sustained, stevedores would then be in a position to deny its responsibility by stating its lack of knowledge of a condition found to be dangerous, and the whole body of law dealing with indemnification between stevedores and the shipowners would be nullified.

The decisions cited by Universal in support of their position for reversal are distinguishable in view of the

finding by the trial Court that a dangerous condition did in fact exist on the gangway and that a workmanlike performance would have eliminated the danger to Scalafani and those similarly situated and which finding was not clearly erroneous (205a).

Courts have consistently held that it is the duty and responsibility of the stevedore contractor to insure that their employees are furnished with a safe place to work to include means of access to the vessel which would include the vessel's gangway. *Crumady* v. *Fisser,* 358 U.S. 423; *Vaccaro* v. *Alcoa Steamship Co.,* 405 F.2nd 1133 (2nd Cir. 1968).

The testimony by Scalafani to the effect that other longshoremen tracked the snow on board during the course of the day would preclude the stevedore from asserting that it did not create nor contribute to the existence of the alleged dangerous condition on the gangway (48a). As the unseaworthy condition was brought into play by Universal's employees which, if they acted properly, the dangerous condition found by the trial Court would not have been created. *Italia Societa, etc.* v. *Oregon Stevedoring Co., supra; Drago* v. *A/S Inger,* 305 F.2d 139 (2nd Cir. 1962).

The ultimate responsibility for the safety condition of the gangway under the pertinent regulations of the Safety and Health Regulations for Longshoring (29 CFR §§ 1918.21, 1918.91) would be upon Universal, so that a breach of the regulations to include compliance therewith would be evidence of a breach of warranty. *Italia Societa, supra.*

As a further basis of Universal's responsibility would be the fact, that if this Court agrees with Mormac's position that Scalafani was negligent in any manner that this would be sufficient to permit indemnity against the stevedores. *Mortensen* v. *A/S Glittre,* 348 F.2d 383 (2nd Cir. 1965); *Orlando* v. *Prudential SS. Co.,* 313 F.2d 822 (2nd Cir. 1963).

The cases cited in Point II of Universal's brief are distinguishable as they relate to a factual pattern wherein equipment or an appurtenance of the vessel were found to be defective but the defect was not obvious upon a cursory inspection which had been conducted by the stevedores prior to commencement of their work.

In *Quadrino* v. *SS. Theron,* 323 F.Supp. 1037 (S.D.N.Y. 1970), aff'd 436 F.2d 950 (2nd Cir. 1970), the trial Court made a specific finding that a cursory inspection would not reveal a defective condition. However, the Court did not rule out that a stevedore could be responsible if they had constructive notice of a dangerous condition. The decision in *Quadrino, supra,* was consistent with prior decisions in this Court cited by counsel for Universal.

In the present situation, the trial Court did determine that a dangerous condition did in fact exist on the gangway which Universal should or could have detected and eliminated and upon Univer. l's failure to do so, the trial Court held that there was a breach of warranty. The determination by Mr. O'Connor that a dangerous condition did not exist on the gangway did not settle the issue. If this was so, in every indemnity claim, a stevedore could avoid its responsibility and conversely, its liability, by testimony from an employee that be believed that a dangerous condition did not exist on the vessel which ultimately resulted in an accident.

CONCLUSION

It is respectfully submitted that the judgment entered in favor of the plaintiff should be dismissed or in the alternative that Mormac should recover on its third-party complaint against Universal.

Respectfully submitted,

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(58783)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHARLES SCALAFANI,
Plaintiff-Appellee,
against
MOORE-McCORMACK LINES, INC.,
Defendant and Third-Party
Plaintiff-Appellant-Appellee,
against
UNIVERSAL TERMINAL STEVEDORING CORP.,
Third-Party Defendant-Appellant.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Juan A. Delgado, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 596 Riverside Drive, New York
That on October 10, 1975, he served 2 copies of Brief on Behalf of Defendant and Third-Party Plaintiff-Appellant-Appellee on

IRVING S. BUSHLOW, Esq.,
Attorney for Plaintiff-Appellee,
26 Court Street,
Brooklyn, N.Y. 11201

COMMETTE, QUENCER & ANNUNZIATO, Esqs.,
c/o McHUGH HECHMAN SMITH & LEONARD,, Esqs.,
80 Pine Street,
New York, New York.

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Juan A. Delgado

Sworn to before me this
10th day of October, 1975

John V. Esposito

JOHN V. ESPOSITO
Notary Public, State of New York
No. 30-0932350
Qualified in Nassau County
Commission Expires March 30, 1977